

Fair Political Practices Commission

Memorandum

To: Chairman Schnur, Commissioners Garrett, Hodson, Montgomery, and Rotunda

From: William J. Lenkeit, Senior Commission Counsel
Scott Hallabrin, General Counsel

Subject: Emergency Adoption of Amendments to Regulations 18734 and 18751—Financial Disclosure by Employees of Newly Created Agencies

Date: January 28, 2011

Proposed Commission Action and Staff Recommendation. Adopt emergency amendment of Regulations 18734 and 18751 concerning financial disclosure requirements by specified employees of new agencies while the agency is preparing its conflict-of-interest code.

Reasons for Proposed Amendment of Regulations. These changes are proposed to clarify an employee's reporting obligations when employed by a new agency pending his or her agency's completion of the adoption of the agency's conflict-of-interest code. This process can sometimes be lengthy. These regulations provide transparency during the code adoption process by requiring employees and consultants in decision-making positions to file statements of economic interests ("SEI").

In October 2009 the Commission adopted Regulation 18734, which provides interim disclosure procedures for "newly created positions." This amendment clarifies that newly created positions include both new positions at existing agencies and all applicable "new" positions at newly created agencies. The amendment is proposed on an emergency basis because, without the amendment, new agencies may be created and operate without any disclosure requirements for officials engaged in governmental decision making. This most often occurs with the formation by governmental agencies of temporary committee-type organizations but it also is relevant to agencies such as the newly created California Citizens Redistricting Commission. At the same time, proposed amendments to Regulation 18751 would eliminate the provision that an agency may operate for less than one year without being required to ever adopt a code.

Discussion: The Political Reform Act¹ requires public officials who make or participate in the making of governmental decisions to file SEIs in which they disclose

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

information regarding their economic interests. There are two categories of filers under the Act: statutory filers, those who are required to file under Section 87200, and “code filers,” those who are required to file under their agency’s conflict-of-interest code pursuant to Section 87300.

The first category of filers, governed by Sections 87200 et seq., includes most high-ranking elected officeholders and other high-ranking state and local government positions. The second category of filers, governed by Sections 87300 et seq., covers all other positions in an agency that “involve the making or participation in the making of decisions [that] may foreseeably have a material effect on any financial interest ...” (Section 87302(a).) Persons who hold these positions are generally referred to as “designated employees” and their positions are listed in an agency’s conflict-of-interest code, which most governmental agencies are required to adopt and promulgate. (Section 87300 and Section 82019 [defining “designated employee”].) These positions, and their respective disclosure requirements, are listed in each agency’s conflict-of-interest code. Generally, new agencies have six months to adopt a code (Section 87303), while agencies that experience changed circumstances must amend their codes within 90 days of the change. (Section 87306.) However, promulgation of code amendments often takes longer than the required 90-day amendment period.

Regulation 18734 was adopted to address the problem of interim decision making prior to the adoption of an agency conflict-of-interest code. The proposed amendment clarifies that the regulation applies to all newly created positions, whether the position is new because the agency is new or because the position is new to the existing agency.

Finally, proposed amendments to Regulation 18751 would eliminate the provision that an agency may apply for an exemption to the requirement that it adopt a conflict-of-interest code if it plans to operate for less than one year. Because of the broad definition of “agency” certain small groups such as temporary committees, task forces, or other similar organizations may qualify as an agency and be required to file a code. Nothing in the Act exempts agencies from filing if they operate for less than a year. Many times, these organizations are formed for brief periods to study certain issues and make recommendations that qualify as governmental decisions. The amendment would require all those working for such organizations to file SEI’s if subject to the provisions of Section 87300 et seq. and eliminate the potential for governmental decision making in the absence of public financial disclosure.

Emergency Regulation Procedure: Under the statutes applicable to the Commission’s adoption of regulations, the Commission may adopt an emergency regulation if, in any particular case the Commission makes a finding, including a statement of facts in writing describing the emergency, that the adoption of a regulation or order of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare. Included with the revised draft of Regulation 18413 and this memorandum is a memorandum detailing staff’s recommended findings in support of the emergency adoption

of the regulation. Once adopted, the regulation will remain in effect for 120 days, unless the regulation is permanently adopted in the interim. Staff proposes to bring this regulation to the Commission for permanent adoption within the 120-day period.